

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Wednesday, December 21, 2005 11:47 AM
To: [REDACTED]
Subject: US v. Barhoumi: Directions of the Presiding Officer
Attachments: Significant Commission Dates - worksheet v1.doc; Email and attachment - First instructions by PO Chester adopted by POs O'Toole and Kohlmann, 21 Dec 05.pdf; PO 2 - Barhoumi - Discovery Order - 21 Dec 05.pdf

1. This email, and attachments 1 and 2, are being added to the filings inventory as PO 1. (See POM 12-1 for a description of the Filings Inventory.)
2. I am Keith Hodges, the Assistant to the Presiding Officer in the case in the subject line of this email. My duties are outlined in Presiding Officer Memorandum (POM - which serve as rules of court) 2-2. That POM, and all the others POMs, can be found at:
http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html. This email, and all others that I send that state "BY DIRECTION OF THE PRESIDING OFFICER" are sent at the Presiding Officer's direction. The Presiding Officer has directed that all the current POMs, to include as later modified or supplemented, are in effect for this case.
3. Your attention is invited to the enclosed Discovery Order (PO 2) for compliance by the parties.
4. NLT 5 Jan 06 the Presiding Officer wishes to know what is the earliest possible time that you and can attend a session of the Commission, without the other members, at Guantanamo to accomplish the following business ("Reply all" with your answer):
 - a. Initial session without members (convening of the Commission.)
 - b. Accused's election of counsel.
 - c. *Voir dire* of the Presiding Officer (materials to assist you in *voir dire* will be sent at a later time.)
 - d. Discussion - and if necessary - litigation concerning the attached discovery order, its terms and enforceability.
 - e. Entry of pleas. (If the accused requests to defer pleas, the Presiding Officer advises he will grant the request.)
 - f. Motions. (If the parties request to defer motions - except a motion as to the wording, terms, and enforceability of the discovery order - the Presiding Officer advises he will grant the request.)
 - g. Setting a schedule for future sessions and the trial to include: law motions (motions other than on the admissibility or form of evidence); evidentiary motions; *voir dire* of the other members, and the trial. The dates the Presiding Officer will be looking at are those on the attached "Significant Dates Worksheet."

12/21/2005

5. If you request a date in paragraph 4 above later than 13 February 2006, your reply must include the reasons for the delay and a calendar showing your activities and commitments - personal and professional - between 5 Jan 2006 and the date you request a delay that make it impossible to proceed by 13 February 2006.

6. NLT 5 Jan 06, the parties will provide the Presiding Officer, opposing counsel, and me a copy of all protective orders, issued by any authority, that they believe have been issued and remain in effect. Any party requesting a protective order from the Presiding Officer will use the procedures in POM 9-1.

7. Also attached is an email sent at the direction of the Presiding Officer adopting "first instructions" issued earlier by another Presiding Officer, COL Chester. The instructions that were adopted are also attached.

Three attachments:

- 1 – PO 2 – Discovery Order
- 2 – Significant dates worksheet
- 3 – Email on adopted "first instructions" and those instructions

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission



<<Significant Commission Dates - worksheet v1.doc>> <<Email and attachment - First instructions by PO Chester adopted by POs O'Toole and Kohlmann, 21 Dec 05.pdf>> <<PO 2 - Barhoumi - Discovery Order - 21 Dec 05.pdf>>

UNITED STATES OF AMERICA

v.

SUFYIAN BARHOUMI
a/k/a Abu Obaida
a/k/a Ubaydah Al Jaza'iri
a/k/a Shafiq

DISCOVERY ORDER (PO 2)

December 21, 2005

1. The Presiding Officer finds that to ensure a full and fair trial, the following ORDER is necessary.
2. This Order does not relieve any party of any duty to disclose those matters that Commission Law requires to be disclosed. Where this Order requires disclosure at times earlier or later than Commission Law provides or requires, the Presiding Officer has determined that such earlier or later disclosure is necessary for a full and fair trial.
3. All disclosures required by this Order are continuing in nature. The times set forth below apply to any matter known to exist, or reasonably believed to exist, on the date this Order is issued. If any matter required to be disclosed by this order is not known to exist on the date this Order is issued, but later becomes known, the party with the responsibility to disclose it under this Order will disclose it as soon as practicable, but not later than three duty days from learning that the matter exists. In those cases when any matter required to be disclosed by this Order, becomes known after the date of this Order, but the party is unable to obtain or produce it as required, the party shall give written (email) notice to opposing counsel within three duty days, said notice including a description of the nature of the item or matter and the date and time when it will be produced or disclosed.
4. Any matter that has been provided or disclosed to opposing counsel prior to the entry of this Order need not be provided again if only to comply with this Order.
5. Providing a list of witness names in compliance with this discovery Order does not constitute a witness request. Witness requests must be made in accordance with POM #10-2.
6. Neither the Presiding Officer nor the Assistant shall be provided with a copy of the items ordered to be produced or disclosed by this Order. If counsel believe there has not been adequate compliance with this Order, counsel shall seek relief using the procedures in POM 4-3 or POM 7-1, as appropriate.

7. Objections to the wording of this Order, or the authority to issue this Order. Counsel who object to the requirements of this discovery Order, the Presiding Officer's authority to issue a discovery order, or who seek any relief from the requirements of this Order shall file a motion in accordance with POM 4-3 NLT 31 Jan 2006.

8. Failure to disclose a matter as required by this Order may result in the imposition of those sanctions which the Presiding Officer determines are necessary to enforce this Order or to otherwise ensure a full and fair trial.

9. If any matter that this Order, or Commission Law, requires to be disclosed was in its original state in a language other than English, and the party making the disclosure has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also disclose a copy of the English translation along with a copy of the original untranslated document, recording, or other media in which the item was created, recorded, or produced.

10. Each of the disclosure requirements of this Order shall be interpreted as a requirement to provide to opposing counsel a duplicate of the original of any matter to be disclosed. Transmittal of a matter to opposing counsel electronically satisfies the disclosure requirements herein and is the preferred method of production. When disclosure of any matter is impracticable or prohibited because of the nature of the item (a physical object, for example), or because it is protected or classified, the disclosing party shall permit the opposing counsel to inspect the item in lieu of providing it.

11. A party has not complied with this Order until that party has disclosed to detailed counsel for the opposing party - or another counsel lawfully designated by the detailed counsel - the matter required to be disclosed or provided.

12. Definitions:

a. "At trial." As used in this order, the term "at trial" means during the proponent party's case in chief (and not rebuttal or redirect), whether on merits or during sentencing. Matters to be disclosed which relate solely to sentencing will be so identified.

b. "Exculpatory evidence" includes any evidence that tends to negate the guilt of the accused, or mitigates any offense with which the accused is charged, or is favorable and material to either guilt or to punishment.

c. "Synopsis of a witness' testimony" is that which the requesting counsel has a good faith basis to believe the witness will say, if called to testify. A synopsis shall be prepared as though the witness were speaking (first person), and shall be sufficiently detailed as to demonstrate both the testimony's relevance and that the witness has personal knowledge of the matter offered. *See* Enclosure 1, POM 10-2, for some suggestions.

d. "Disclosure" as used in this Order is synonymous with "production."

e. "Matter" includes any matter whatsoever that is required to be produced under the terms of this Order, whether tangible or intangible, including but not limited to, physical objects,

documents, audio, video or other recordings in any media, electronic data, studies, reports, or transcripts of testimony, whether from depositions, former commission hearings, or other sworn testimony.

13. Nothing in this Order shall be interpreted to require the disclosure of attorney work product to include notes, memoranda, or similar working papers prepared by counsel or counsel's trial assistants.

14. The Prosecution shall provide to the Defense the items listed below not later 31 Jan 2006. The items shall be provided to the detailed defense counsel unless the detailed defense counsel designates another lawful recipient of the items.

a. Evidence and copies of all information the prosecution intends to offer at trial.

b. The names and contact information of all witnesses the prosecution intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Exculpatory evidence known to the prosecution.

e. Statements of the accused in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:

1. The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.

2. Are relevant to any offense charged, and were sworn to, written or signed by the accused, whether or not to be offered at trial.

3. Are relevant to any offense charged, and were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial.

f. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

15. The Defense shall provide to the detailed Prosecution the items listed below not later than 28 Feb 2006. The items shall be provided to the detailed prosecutor unless the detailed prosecutor designates another lawful recipient of the items. These provisions shall not require the defense to disclose any statement made by the accused, or to provide notice whether the accused shall be called as a witness.

a. Evidence and copies of all matters the defense intends to offer at trial.

b. The names and contact information of all witnesses the defense intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the defense intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Prior statements of witnesses the defense intends to call at trial, in the possession or control of the defense counsel, or known by the defense counsel to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3.) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

e. Notice to the Prosecution of any intent to raise an affirmative defense to any charge. An affirmative defense is any defense which provides a defense without negating an essential element of the crime charge including, but not limited to, lack of mental responsibility, diminished capacity, partial lack of mental responsibility, accident, duress, mistake of fact, abandonment or withdrawal with respect to an attempt or conspiracy, entrapment, accident, obedience to orders, and self-defense. Inclusion of a defense above is not an indication that such a defense is recognizable in a Military Commission, and if it is, that it is an affirmative defense to any offense or any element of any offense.

f. In the case of the defense of alibi, the defense shall disclose the place or places at which the defense claims the accused to have been at the time of the alleged offense.

g. Notice to the prosecution of the intent to raise or question whether the accused is competent to stand trial.

16. When Alternatives to Live Testimony Will Be Offered by a Party.

a. The testimony of a witness may be offered by calling the person to appear as a witness before the Commission (live testimony) or by using alternatives to live testimony.

b. Whenever this Order requires a party to disclose the names of witnesses to be called, a *Discovery Order, US v. Barhoumi, Page 4 of 5 Pages, Dec 21, 2005*

party which intends to offer an alternative to live testimony shall provide the notice below to the opposing party:

(1.) Intent to use alternatives to live testimony rather than calling the witness.

(2.) The method of presenting the alternative to live testimony the party intends to use. (*See* paragraph 3c(6)(a-g), POM 10-2, for examples),

(3.) The dates, locations, and circumstances - and the persons present - when the alternative was created, and

(4.) The reason(s) why the alternative will be sought to be used rather than production of live testimony.

17. Objections to Alternatives to Live Testimony.

If, after receiving a notice required by paragraph 16 above, the party receiving the notice wishes to prevent opposing counsel from using the proposed alternative to live testimony, the receiving party shall file a motion under the provisions of POM# 4-3. Such motion shall be filed within 5 days of disclosure of the intent to offer an alternative to live testimony, or the receiving party shall be deemed to have waived any objection to the use of an alternative to live testimony.

18. Obtaining or Creating Alternatives to Live Testimony - Notice and Opportunity to Attend and Participate.

a. Under Commission Law, confrontation of persons offering information to be considered by the Commission is not mandatory, nor is there a requirement for both parties to participate in obtaining or creating alternatives to live testimony. Further, there is no general rule against hearsay.

b. As a result, parties must afford opposing counsel sufficient notice and opportunity to attend witness interviews when such interviews are intended to preserve testimony for actual presentation to the Presiding Officer or other members of the Commission.

c. Failure to provide such notice as is practical may be considered - at the discretion of the Presiding Officer (or in a paragraph 6D(1), MCO# 1 determination, by the other Commission members) - along with other factors, on the issue of admissibility of the proffered testimony.

IT IS SO ORDERED:

DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

Significant Commission Dates
United States v. _____

# ¹	Event	Date	Notes
1.	First session (without members) <ul style="list-style-type: none"> • Convening the Commission • Choice of counsel • Voir dire of PO • Pleas (ordinarily reserved) • Motions (ordinarily reserved) 		
2.	Provide copies of existing Protective Orders to PO		
3.	Submit Protective Orders for PO signature.		POM 9-1
4.	Discovery – Prosecution ²	xxx	
5.	Discovery – Defense ²	xxx	
6.	Requests for access to evidence		POM 7-1
7.	“Law” Motions: <i>Motion</i> ³		POM 4-3
8.	“Law” Motions: <i>Response</i>		POM 4-3
9.	“Law” Motions: <i>Reply</i>		POM 4-3
10.	Witness requests on law motions		POM 10-2
11.	Evidentiary motions: <i>Motion</i>		POM 4-3
12.	Evidentiary motions: <i>Response</i>		POM 4-3
13.	Evidentiary motions: <i>Reply</i>		POM 4-3
14.	Witness requests on evidentiary motions		POM 10-2
15.	Voir dire of members		
16.	Prosecution case in chief - <i>Merits</i>		Also indicate # of days to present
17.	Defense case in chief - <i>Merits</i>		Also indicate # of days to present
18.	Prosecution – <i>Sentencing</i>		Also indicate # of days to present
19.	Defense - <i>Sentencing</i>		Also indicate # of days to present
20.	Witness requests – merits and sentencing		POM 10-2
21.	Directed briefs ⁴	xxx	
22.	Requests to take conclusive notice		POM 6-2

¹ The requested dates do not have to be in the chronological order that they appear on this list. For example, counsel may request an earlier date for item 15 than they would for item 7.

² Discovery dates will be included in the discovery order.

³ A “law motion” is any motions except that to suppress evidence or address another evidentiary matter.

⁴ Dates will be established in the directed brief if directed briefs are used.

Hodges, Keith

From: Hodges, Keith
Sent: Wednesday, December 21, 2005 11:03 AM
Subject: Military Commission Business

Attachments: First PO instructions to Panel 2 dtd 1 Dec 05.pdf

1. On December 1, 2005, COL Chester sent you instructions concerning your possible service as a member of a Military Commission. A copy of those instructions is attached.
2. Since that time, two additional Presiding Officers have been appointed, and it is possible that if you sit as a Commission member, one of these officers could also be the Presiding Officer. The two other Presiding Officers are CAPT Daniel O'Toole, USN, and COL Ralph Kohlmann, U.S.M.C.
3. CAPT O'Toole and COL Kohlmann have adopted COL Chester's earlier (attached) instructions, and those instructions are now applicable to any Commission in which COL Chester, CAPT O'Toole, or COL Kohlmann is the Presiding Officer.
4. Please reply to me that you have received this email.
5. It does not appear likely that any Military Commission will need your services through the end of February 2006.

BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers
Military Commission



First PO instructions
to Panel...

Instructions to Prospective Commission Members
To be provided by APO to each prospective member.

1 December 2005

This email is being sent to each prospective member by Keith Hodges, Assistant to the Presiding Officers for Military Commissions, at the direction of and on behalf of Colonel Chester.

1. I am Colonel Robert S. Chester. I am the Presiding Officer for Military Commissions to which you have been detailed.
2. You have been detailed as a prospective member to a Military Commission convened to try one or more individuals now being detained at US Naval Station, Guantanamo Bay, Cuba. It is possible you will be detailed to hear a case with a different Presiding Officer in which case you will receive instructions from that officer.
3. Each of you must respond by email to Mr. Hodges, the Assistant to the Presiding Officers, acknowledging receipt of these instructions. I am aware that you received an email from Mr. Hodges earlier, but acknowledge receipt of these instructions as well. Email will be the preferred method to provide you any information. You will not receive any classified emails concerning your service as a member, and you may not send any. Please also tell Mr. Hodges your home mailing address in the event we need to mail you something. (We find that mail to home addresses is quicker and nothing gets x-rayed.)

Your personal-information will NOT be released to anyone else, and will ONLY be used for emergencies.

4. Due to the publicity that these cases may have already received, and recognizing the possibility of further publicity, each of you is instructed as follows:
 - a. You may not discuss with anyone, other than as required to inform your military superiors and family of your duty status, your detail to this Commission as a prospective member. You must not listen to, look at, or read any accounts of alleged incidents involving these cases or any accounts of any proceedings in these cases, or any matters concerning the detention of detainees at Guantanamo. Please moderate your web surfing accordingly. You may not consult any source, written or otherwise, as to matters involved in such alleged incidents to include any legal references. You may not discuss these cases with anyone, and if anyone attempts to discuss these cases with you, you must forbid them to do so and report the occurrence to me by emailing the Assistant, Mr. Hodges.
 - b. A trial by Military Commission includes the determination of the ability of each member to sit as a member. As a prospective member, you may be questioned in open session by counsel for either side or by myself to determine whether you should serve.

c. Trial by Military Commission requires members who approach the case with an open mind, and you must keep an open mind until all of the evidence and law has been presented and the Commission closes to deliberate. A Commission member should be as free as humanly possible from any preconceived ideas as to the facts or the law. From the date of receipt of these instructions, you must keep a completely open mind and wait until all of the evidence is presented, you have been instructed on the law to be applied, and the Commission has retired to deliberate before you discuss the facts of this case with anyone, including other Commission members.

5. Administrative matters:

a. If you believe there is a reason you should be excused from serving on the Commission and you request that you be excused, you may make such a request to the Appointing Authority through the Chief Clerk for Military Commissions (Mr. Harvey at email [REDACTED])

b. All sessions of the Commission will be held at Naval Base, Guantanamo Bay, Cuba. It is not known when the first session will be held, and you will be informed as soon as I know. All TDY costs will be born by the Office of Military Commissions. At Guantanamo:

1) You will be given the opportunity to access web based email. To do this, you will obviously have to know the web address for your command's Exchange server, or you must have a free web account such as hotmail, yahoo, or the like.

2) Normal cell phones will NOT work at Guantanamo. However, you will have access to Class A phone service on an as-needed basis.

c. Both Mr. Harvey and Mr. Hodges are authorized to send you administrative information concerning logistics, security clearances, uniforms, lodging, orders, travel and the like. They will not be communicating with you concerning the facts, the law, or any other aspect of any case.

/s/

Robert S. Chester
Colonel, USMC
Presiding Officer